88-2100

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

THOMAS JOSEPH DUFON, Petitioner

v.

STATE OF CALIFORNIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE

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QUESTIONS PRESENTED

1. Whether a separate showing of prejudice is required by the Sixth Amendment, as applied through the Fourteenth Amendment, where a criminal defendant, without knowledge thereof, is represented at trial by a lawyer who has brain damage resulting in cognitive impairment and an inability to assimilate facts and was declared, after the trial, to have been totally and permanently disabled during the entire period of representation.

2. Does a sixth amendment claim of ineffective assistance of counsel incorporate the issue of right to counsel as an essential and inseparable element of that right.

PARTIES

The parties to the proceedings below were the petitioner Thomas Joseph DuFon and the respondents John Van De Kamp, Attorney General of the State of California on behalf of the State of California.

The parties before this Court are the same.

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v.

STATE OF CALIFORNIA, Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

The petitioner Thomas Joseph DuFon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One, entered in the above-entitled proceeding on March 2, 1989.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division One, has not been reported and is

reprinted in the appendix hereto, p. a1, infra.

The order denying review without opinion by the California Supreme Court is reprinted in the appendix hereto, p. a51, infra.

JURISDICTION

Petitioner brought a petition for writ of habeas corpus in the California Court of Appeal, Fourth Appellate District, Division One, on February 24, 1988. On March 2, 1989, the Court of Appeal denied the petition in a forty-three page opinion.

On March 13, 1989, Petitioner filed a petition for review in the California Supreme Court. On April 25, 1989, the petition for review was denied In Bank without opinion.

The jurisdiction of this Court to review the judgment of the California Court of Appeal, and California Supreme Court, is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner asserts violations of The Constitution of the United States of America, Amendment VI, Section 1.,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Frank Nemser, a trial lawyer, suffered a sudden severe brain seizure on October 8, 1978. Aneurysms were diagnosed and brain surgery performed on October 16, 1978. Additional surgery was required two days later. Mr. Nemser's neurosurgeon, Dr. Sidney Tolchin, continued to see Mr. Nemser after surgery and prescribed physical therapy, occupational therapy, and speech and language

rehabilitation. A third brain surgery was required on November 9, 1978, and a fourth on December 11, 1978.

In November of 1979, Mr. Nemser inquired of Dr. Tolchin whether he could return to work. Dr. Tolchin required a battery of psychological tests prior to advising him, particularly in light of recent episodes of memory loss. Tests were performed on January 18, 1980. The tests showed impaired perceptual and visual-motor functioning, poor ability to assemble jig-saw like puzzles, and poor ability to identify missing portions of pictures of common objects. Logical memory from orally presented information was well below average and Nemser exhibited problems with intellectual organization and lack of reality perception as situations became more ambiguous. Also noted was difficulty separating complex situations into logically consistent separate entities. (Petition for Writ of Habeas Corpus, Exhibits A1 - A13.2.)

Serious concerns about Mr. Nemser's ability to function as a trial attorney were expressed in the follow-up report, including a recommendation that he consider work where memory was less important and issues more clear-cut. (Petition for Writ of Habeas Corpus, Exhibit A13.) On

February 15, 1980, the results of the tests were discussed with Mr. Nemser. Dr. Tolchin told him that he could not assume any responsibility should Nemser return to practice. (Petition for Writ of Habeas Corpus, Exhibit14.) On March 28, 1980, Frank Nemser agreed to represent Petitioner. Petitioner was never informed by Mr. Nemser of the nature or extent of any mental impairment.[1]

Petitioner was charged with 13 counts of rape, kidnaping and sexual assault involving six complaining witnesses. Thomas DuFon was convicted on November 19, 1980, and sentenced to the California State Prison.

On February 11, 1981, thirty-four days after Petitioner was sentenced, Mr. Nemser requested, and received, from Dr. Tolchin a letter indicating Nemser was totally and permanently disabled as of January 1980. (Petition for Writ of Habeas Corpus, Exhibits 15.1 - 15.2.) Frank Nemser died on October 20, 1985.

During the course of Petitioner's case, Petitioner spent a total of one and one-half hours with Mr. Nemser. Petitioner

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1. The condition was not discoverd until records were obtained by instant counsel in 1987.

maintained his innocence throughout and testified in his own behalf. Following his conviction, a "family friend" was hired to pursue an appeal. An appeal was taken to the Court of Appeal of the State of California, Fourth Appellate District, Division One. That appeal was denied and appellate counsel let lapse any period for review.

Petitioner, through instant counsel, analyzed and re-investigated the facts of Petitioner's case. A Petition for Writ of Habeas Corpus was filed in the Court of Appeal of the State of California, Fourth Appellate District, Division One, on February 24, 1988. Petitioner relied on federal authority holding that a showing of prejudice was not required under certain conditions and argued that Nemser's specific mental infirmity was such a condition. Petitioner also alleged numerous instances of Mr. Nemser's failure to understand the nature and complexity of evidence to underscore his claim. Alternatively, Petitioner argued specific error resulting in prejudice.

The Court of Appeal held that the federal authority[2]

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2. Specifically, Javor v. United States, 724 F.2d 831 (9th Cir. 1984), involving a lawyer who slept through part of the proceedings.

cited addressed the issue of right to counsel while Petitioner's claim was that of ineffective representation. The Court of appeal did not address the substantive issue of "presumed prejudice" raised by Petitioner and application of that principle to Petitioner's case.

Petitioner alternatively claimed that specific errors and omissions made by defense counsel fell below an objective standard of effective assistance of counsel and resulted in prejudice. The Court of Appeal summarily rejected several of Petitioner's claims. While finding Mr. Nemser's representation within the standard for effective representation in some areas it was held to fall below the standard in handling semen data analysis. The Court of Appeal failed to address a vital issue raised by Petitioner; Mr. Nemser failed to effectively present fully exculpatory evidence to the jury in two of the cases. The semen analysis by a nationally renowned expert eliminated Petitioner as the perpetrator. Petitioner was convicted in those two cases.

The Court of Appeal repeatedly referred to Nemser's death as relating to the inability of Petitioner to establish whether deficiencies complained of were tactical choices or error. The court resolved the error in favor of presumed

tactical choice. The Court of Appeal held that Petitioner did not make a prima facie showing that Nemser failed to act in a manner expected of a reasonably competent attorney acting as a reasonably diligent advocate, except as noted above. The opinion further held that even if a prima facie showing was made, Petitioner was not prejudiced. The Petition for Writ of Habeas Corpus was denied.

Petitioner filed a Petition for Review in the Supreme Court of California on March 13, 1989. The Petition was denied without opinion on April 25, 1989.

REASONS FOR GRANTING THE WRIT

I.

The holding of the California Court of Appeal, that a showing of prejudice is required by the Sixth Amendment in this case conflicts with the holding of the Ninth Circuit, and this Court, recognizing specific exceptions to that requirement.

The California Court of Appeal, with approval of the Supreme Court of California, has applied an overly-rigid standard to effective assistance of counsel claims brought under the Sixth Amendment. Requiring a showing of actual prejudice, under the circumstances of this case, ignores

tradition set by this Court.

The right to effective assistance of counsel is embodied in the Sixth Amendment right to counsel. McMann v. Richardson, 397 U.S. 759 (1970). The general test applied to Sixth Amendment right to counsel case requires a showing that the attorney's performance fell below an objective standard of competence resulting in prejudice to the defense. Strickland v. Washington 466 U.S. 668 (1984), reh. den. 467 U.S. 1267.[3] There are, however, recognized exceptions to the requirement of actual prejudice. No independent showing of prejudice is required where defense counsel has been denied summation. Herring v. New York, 422 U.S. 853 (1975). No showing of prejudice has been required where defendant's counsel was denied the right to cross-examine a witness (Davis v. Alaska, 415 U.S. 308 (1974)), or where counsel has been denied access to a defendant during a 17 hour recess (Geders v. U.S., 425 U.S. 80 (1976)).

Petitioner relied on a Ninth Circuit case, Javor v. United States, 724 F.2d 831 (9th Cir. 1984), which held,

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3. Also see McMann v. Richardson, supra; United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973)

> ...that when an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary. [Cit.]

Javor v. United States, supra at 833. Mere physical presence alone falls short of the sixth amendment guarantee of counsel.

Petitioner argued to the Court of Appeal that Mr. Nemser's brain damage was equivalent in effect to an attorney who sleeps through trial. Petitioner, in his prayer for relief, requested the Court of Appeal "to hold that prejudice may be presumed where defense counsel suffers from a mental illness which affects the intellectual skills necessary for effective advocacy." (Petition for Habeas Corpus, p. 130). In the alternative, Petitioner argued that a sufficient showing of prejudice had been made.

The Court of Appeal declined to discuss the merits of the Javor opinion. Whether Mr. Nemser's condition was a functional equivalent of the sleeping lawyer in Javor was not discussed. Instead, the Court of Appeal held that Javor was not applicable because the holding was not based on ineffective representation but on an absence of legal counsel.

(See Appendix, Court of Appeal Opinion, p. a13 - a14.) That is a misinterpretation of the Sixth Amendment.

The principle of "constructive" denial of counsel has been recognized by this Court.

> Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a lawfully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

United States v. Cronic, 466 U.S. 648, 659-660 (1984). This Court continues to recognize exceptions to the showing of prejudice. See Strickland v. Washington, 466 U.S. 668, 692 (1984). Javor v. United States, supra, precedes both the Cronic and Strickland opinions and was referred to by Justice Brennan in his dissenting/concurring opinion. Strickland v. Washington, supra, at 704.

Javor represents the correct interpretation of the Sixth Amendment right to counsel. The Ninth Circuit Court of Appeals pointed out that the impossibility of establishing prejudice where a lawyer is unable to give full attention to the

defendant's case mandates an exception to the general ineffectiveness standard. Id.

> When there is an absence of counsel, "the evil lies in what the attorney does not do, and is either not readily apparent on the record, or occurs at a time when no record is made."

Javor v. United States, supra at 834. The California Court of Appeal's holding in this case contradicts that of Javor.

There now exists direct conflict between the federal and California courts. Review in the Supreme Court is therefore necessary to establish consistency among federal and state courts.

II.

> The illusory distinction between the right to counsel and the right to effective assistance of counsel applied by the court below raises a question of important and unresolved constitutional interpretation requiring clarification and standardization by this Court.

The California Court improperly distinguished the right to counsel and the right to effective assistance of counsel and refused to apply the federal standard set forth in Javor v. United States, supra. (See Appendix, Opinion, p. a13 - a14.) That distinction is illusory and resulted in denial of Petitioner's

sixth amendment right.

The sixth amendment guarantees the right to counsel. Case law defining effective assistance of counsel simply expands the scope of the right to counsel.

> In Javor's case, his sixth amendment right to effective assistance of counsel was violated in that he had no assistance during a substantial portion of his trial.

Javor v. United States, supra at 834, (emphasis original). Also see United States v. Cronic, supra; Strickland v. Washington, supra. The right to effective assistance of counsel is an essential and inseparable element of the sixth amendment right to counsel. The necessity of defining the relationship between the right to counsel and the right to effective assistance of counsel is vital to the public interest and a uniformly applied system of criminal justice.

It is incumbent of this Court to clarify the unity of the two concepts and dispel any future attempts by state courts to circumvent the clear intent of the sixth amendment.

CONCLUSION

For the various reasons cited, this petition for certiorari should be granted. The California Court of Appeal, Fourth Appellate District, Division One, and the California Supreme Court, are in direct conflict with federal authority. The opinion below also raises important and unresolved questions of interpretation regarding the sixth amendment right to counsel.

DATED: 6/21/89 Respectfully submitted,

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APPENDIX

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re THOMAS JOSEPH DUFON, on Habeas Corpus	D007585 (Super. Ct. Nos. CR50275 & CR51133

PETITION for a writ of habeas corpus. Joseph A. Kilgarif, Judge. Petition denied.

In November 1980, Thomas Joseph DuFon (DuFon) was convicted of multiple crimes, including six rapes. Evidence upon which DuFon was convicted included identification by the six victims and DuFon's alleged admission to the police that several of the victims had voluntarily engaged in sex with him. He is currently serving a 27-year sentence. The convictions were upheld on appeal by this court.

DuFon contends he was denied his constitutional right to effective assistance of counsel both at trial and on appeal. According to DuFon, his trial counsel, attorney Frank Nemser, "suffered brain aneurysms with attendant brain damage prior to, and during," his representation of Dufon. As a result of his neurological impairment, DuFon claims Nemser made numerous errors of a serious magnitude throughout the investigation, preparation and presentation of DuFon's case. Further facts are developed as needed in the discussion which follows.

DISCUSSION

I

Preliminary Matters

The People in their response, filed pursuant to California Rules of Court, rule 60, do not address the numerous specific incidents of incompetence raised in DuFon's petition. Rather, they urge DuFon is not entitled to relief: 1) because the record (i.e., the decision on appeal) conclusively shows DuFon was rendered competent trial representation, and 2) because DuFon's claims are barred by laches.

The Effect of the Appeal

The People argue this court has already considered Nemser's illness on appeal and determined Nemser provided adequate assistance of counsel. "[T]he function of an appellate court, in reviewing a trial court judgment on direct appeal, is limited to a consideration of matters contained in the record of trial proceedings... ." (People v. Merrian (1967) 66 Cal.2d 390, 396-397, fn. omitted.) And while habeas corpus cannot serve as a second appeal, denial of effective assistance of counsel is always subject to collateral attack whether or not it was raised on appeal. (See People v. Jackson (1973) 10 Cal.3d 265, 268; In re Hochberg (1970) 2 Cal.3d 870, 875.)

Delay in Filing the Petition

A more serious question is raised, however, with respect to the delay in filing the petition. Where a substantial delay has occurred between the original conviction and the petition for writ of habeas corpus, the petitioner must explain and justify the delay in making his claim. (People v. Jackson, supra, 10 Cal.3d. 265, 268; In re Swain (1949) 34 Cal.2d 300, 302, 304.) Here, there was a more than seven-year delay between DuFon's conviction and the filing of this petition.

The People contend that there is no excuse for DuFon's delay since he has known Nemser was ill and suffered from brain seizures at least since the issue was first raised on appeal. While it is clear from the record DuFon knew at least since the time of the appeal that Nemser had undergone surgery and was taking medicatio to ward off brain seizures during trial, DuFon claims he wa unaware of the extent of Nemser's disability and its possib impact on the conduct of his case until present counsel obtained certain medical records in 1987. The record supports his contention.

The People also argue the petition should be denie because they have been prejudiced by what they consider to be an unjustified delay. It is the People's position the petition is filed now only because Nemser died in October 1985, thereby making it impossible for them to rebut the allegations of incompetence through the testimony of trial counsel. DuFon on the other hand contends the delay wa due to ineffective appellate counsel and DuFon's inability t secure legal assistance from other attorneys once his appellate counsel withdrew. We agree the People's ability to respond to DuFon's allegations of Nemser's

ineffectiveness has been hampered by Nemser's death and the People have therefore been prejudiced by DuFon's delay.[1] However, we find no california law to the effect that prejudice alone will result in the denial of a petition. Additionally, under the proper circumstances, a defendant's delay has been justified, at least in part, by his inability to represent himself and his inability to secure legal assistance to pursue his case. (See, e.g., In re Saunders (1970) Cal.3d 1033, 1040-1041; In re Spears (1984) 157 Cal.App.3d 1203, 1208.)[2]

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1 DuFon contends the people have not been prejudiced by the delay because Nemser's tactical choices are not in issue but rather the physical inability of counsel to function within the meaning of the Sixth Amendment guarantee of effective assistance of counsel. DuFon argues Nemser's physical condition being the issue, there is no prejudice since the People have the same access as DuFon to the facts relating thereto. DuFon's argument implies a writ of habeas corpus may issue based upon Nemser's physical condition alone, without reference to whether his representation to DuFon fell below objective standards of reasonableness or, if so, whether DuFon was prejudiced thereby. DuFon has not cited, nor have we located, any support for his position, which we reject. (See section III, infra.

2 The people appear to argue the fact DuFon failed to file a petition for a writ of habeas corpus in pro per demonstrates his delay was unjustified. The People, however, do not cite any authority for denying a petition simply because a defendant failed to act in pro per to pursue his rights.

We therefore look to DuFon's petition to determine whether his delay is so justified.

DuFon in his verified petition contends that since this court denied his appeal he has diligently sought legal assistance to pursue further review, first from his appellate counsel, Alvin W. Beardsley (Beardsley), and later from numerous other attorneys. DuFon claims he repeatedly attempted to have Beardsley seek further review for over two and a half years and supports his contention with copies of correspondence. After Beardsley withdrew, DuFon contends he and his family sought help from numerous attorneys and legal groups including at one time sending out over 70 letters. The family, its resources allegedly depleted by the trial, could not pay the retainers necessary to have anyone review the case. It was not until March 1987 that DuFon's present counsel agreed to take the case on a pro bono basis. It then took present counsel and his staff almost one year to review the record, investigate and develop new evidence, and prepare the petition.[3]

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3 Considering the multiple issues raised and the fact the work was done on a pro bono basis, in addition to counsel's normal caseload, the time required to prepare the

As to DuFon's efforts to have appellate counsel pursue his cause, the letters submitted in support of the petition show considerable gaps in DuFon's correspondence with Beardsley after denial of his appeal, including one gap, in excess of 15 months and another in excess of 10 months. The submitted correspondence does not represent a "steady stream" of communi- cation as claimed by DuFon. Additionally, statements in DuFon's petition regarding his efforts deal primarily with Beardsley's failure to file for review of this court's decision by the Supreme Court. However, review of the submitted letters indicates DuFon, at least on an intermittent basis, requested Beardsley either pursue his case directly or review work prepared by an inmate writ writer. No explanation is given in the petition as to why the writ that was being prepared by the inmate was not filed.

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petition was not unreasonably long. It is evident from the record counsel and his staff expended a tremendous effort in preparing the petition and they are to be commended on performing the task on a pro bono basis.

As to whether DuFon acted diligently after Beardsley's withdrawal, the submitted correspondence gives little support to DuFon's position since more than a year and a half passed between Beardsley's withdrawal and DuFon's first documented contact with another attorney. DuFon's verified petition, however, alleges multiple unsuccessful attempts by DuFon and his family to find an attorney to pursue DuFon's cause before they located present counsel. While DuFon could have been more specific as to when in the more than two and a half years these efforts occurred, the petition at least raises a factual question whether DuFon acted diligently.

Considering the record as a whole, we believe the People's position DuFon has not satisfactorily justified his delay has some merit. However, we find it a close question, and considering the constitutional magnitude of DuFon's claims, we reach the merits of his contentions while at the same time keeping in mind the prejudice the People have suffered as a result of Nemser's death.

II

Further Facts

Summary of the Cases

DuFon was convicted of multiple counts including rape, forcible oral copulation, kidnaping and deadly weapon enhancements. The specific incidents are as follows:

Jeri 0. and Vickie B. Case

On September 6, 1979, two female teen-age hitchhikers were picked up near 54th Street and University Avenue in San Diego by a man in a blue pickup truck with a white camper shell. The man took them to the parking area of a church and, at gunpoint, raped Vickie B. (age 16) and assaulted Jeri 0. (15 years of age) in the camper.

Debbie B. Case

On November 27, 1979, a man, at gunpoint, raped and orally copulated Debbie B. (age 25) in the storeroom of her workplace, a retail store for eyeglass frames, in La Mesa. , The attacker remained in the store after the attack and several customers observed him.

Kathy P. Case

On December 24, 1979, a man offered Kathy P. (age 19) a ride after she missed her bus near El Cajon Avenue and 52nd Street. She agreed and he took her to his blue pickup truck with camper shell. As they were driving, the man displayed a gun. He drove her to a park where he

threatened her with a knife and then raped her and forced her to orally copulate him in the camper.

Margo M. Case

On January 7, 1980, Margo M. (age 25) was raped in her El Cajon apartment by a man who entered under the pretense of using her phone. Margo M.'s three-year-old son was present in the apartment. The man used a gun in the commission of the rape.

Stephanie W. Case

On January 30, 1980, a man in a blue pickup truck with white camper shell approached Stephanie W. (age 22) at a market at the corner of 52nd Street and El Cajon Boulevard where she had gone to find boxes. He offered to drive her to the other side of the market where he said there were plenty of boxes that he would pick up for her. After she was in the pickup he displayed a gun and a knife and drove her to a parking lot. There he forced her to orally copulate him in the camper. The man also raped Stephanie W. and put the handle of a brush in her vagina.

DuFon's Arrest and Identification

On March 27, 1980, DuFon, driving a blue pickup with white camper shell, was stopped and arrested on El

Cajon Boulevard in San Diego. San Diego and La Mesa police officers questioned DuFon who allegedly admitted he had engaged in voluntary sexual relations with Vickie B., Kathy P., Stephanie W., and Margo M. and denied attacking Debbie B. On March 28, 1980, DuFon's father retained Nemser to represent his son. On that same day the police conducted a lineup without Nemser present. All of the victims identified DuFon. Another victim of a rape attempt, Kathy E. , was also present but did not identify DuFon. After DuFon was arraigned he was released on bail.

Janice C. Case

On July 7, 1980, in Imperial Beach, Janice C. (age 19) asked a man driving an automobile, license number O9OFLD, to give her a ride. Rather than taking her to work as she wanted, he pulled a knife and drove her to a deserted area where he raped and orally copulated her. Janice C. identified DuFon from a photographic lineup.

Nemser's Disability

In October 1978, Nemser suffered a brain seizure caused by aneurysms and underwent brain surgery four times between October and December 1978. When Nemser wanted, to return to work in January 1980, his

doctor recommended he first undergo psychologiCal testing. The testing showed substantial brain dysfunction, including deficiencies in intellectual organization, conceptual distortions, flaws in logic, difficulty in separating complex situations into logical consistent separate entities, and a tendency to combine ideas that occur contiguously in space or time rather than separating them if they did not relate. The psychologist administering the test felt the dysfunction could substantially interfere with Nemser's ability to function as a trial attorney and thought it might be advisable for Nemser to consider doing other work. However, the psychologist acknowledged Nemser's experience could at least to some extent counter the impairment. Nemser's physician, while accepting the results of the test as valid, thought Nemser's intuitive ability and experience might allow him to practice on a normal basis. Ultimately, the physician left the decision on resuming practice to Nemser.

In March 1980, Nemser became DuFon's defense attorney. One month after DuFon's sentencing, Nemser requested and received from his doctor a statement that he was totally and permanently disabled since January 1980.

III

Legal Standard for Relief

Habeas corpus lies to review a claim a defendant has been denied effective assistance of counsel either at trial or on appeal. (See, e.g., People v. Jackson, supra, 10 Cal.3d 265, 2687 In re Banks (1971) 4 Cal.3d 337, 343.) However, the defendant bears the burden of stating in his petition a prima facie case entitling him to relief if true. (In re Bower (1985) 38 Cal.3d 865, 872.)

> "To establish that counsel's assistance was sufficiently ineffective to justify the issuance of a writ of habeas corpus, petitioner must first demonstrate that counsel's performance "fell below an objective standard of reasonableness... under prevailing professional norms." [Citation.] . . . .
>
> "Defendant must also show that if counsel's performance fell below acceptable standards in some respect, a reasonable probability exists that a more favorable outcome would have been reached absent the deficient performance. [Citation.] That probability must be one sufficient to undermine confidence in the outcome of the trial. [Citations.]" (People v. Karis (1988) 46 Cal.3d 612, 657; see also People v. Pope (1979) 23 Cal.3d 412, 424-425.)

DuFon, however, argues Nemser's physical condition rendered him incapable of effectively representing DuFon as a matter of law. He further argues that under the

circumstances of this case prejudice should be presumed and no separate showing of prejudice required. DuFon relies on Javor v. United States (9th Cir. 1984) 724 F.2d 831, which held that no separate showing of prejudice was required where a defendant's counsel slept through a substantial part of the trial because such conduct was inherently prejudicial. (Id. at p. 833.) The Javor decision was based upon the fact the defendant's "right to counsel was violated not because of specific legal errors or omissions indicating incompetence, but because he had no legal assistance during a substantial portion of his trial." (Id. at pp. 833-834, emphasis in original.) Here, there is no contention DuFon was without representation but rather that Nemser's representation was ineffective because of his disability.

We therefore look to DuFon's petition to determine if based upon his allegations of specific errors and omissions he has stated a prima facie case of ineffective assistance of counsel and, if so, whether prejudice resulted.

IV

Ineffective Assistance in Connection with Motions

DuFon contends Nemser's failure to conduct a careful

investigation of the facts and law relating to four key motions require the issuance of the writ of habeas corpus.

> "To render reasonably competent assistance, an attorney in a criminal case must perform certain basic duties. [Citation.] Generally, the Sixth Amendment and article I, section 15 require counsel's 'diligence and active participation in the full and effective preparation of his client's case.' [Citation.] Criminal defense attorneys have a "duty to investigate carefully all defenses of fact and of law that may be available to the defendant failure to perform these obligations results in the withdrawal of a crucial or potentially meritorious defense, "the defendant has not had the assistance to which he is entitled." [Citation.]
>
> "Of course, the burden of proving a claim of inadequate trial assistance is on the appellant. [Citation.] Thus, appellant must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. In addition, appellant must establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense." (People v. Pope, supra, 23 Cal.3d 412, 424-425, fns. omitted.)

Penal Code Section 1538.5 Motion

DuFon contends Nemser failed to investigate the facts surrounding DuFon's arrest which resulted in the withdrawal of a crucial defense, i.e., lack of probable cause to stop and detain DuFon.

Officer Penalosa (Penalosa), the arresting officer,

was a patrol officer assigned to the area of San Diego where most of the victims had been picked up. Penalosa had investigated a report of a missing juvenile and interviewed Jeri 0. and Vickie B. Vickie B. said she had been raped and gave Penalosa a description of the rapist and his vehicle. Penalosa was later the investigating officer on the Stephanie W. case. Recognizing a similarity between the two crimes, Penalosa contacted the sex crimes division and obtained information on the series of rapes in his patrol area. He began looking for the rapist and stopped a number of blue trucks with white campers. While having lunch in a restaurant he spotted DuFon driving on El Cajon Boulevard, called in for a backup, and executed a hot stop.

While Nemser filed a Penal Code section 1538.5 motion to suppress the evidence seized as a result of DuFon's stop and arrest, DuFon contends Nemser provided ineffective assistance of counsel because he failed to carefully investigate the stop and arrest. DuFon contends Penalosa's arrest report indicated DuFon was stopped merely because he was a white male driving a blue truck with a white camper and also that the report, with respect

to when Penalosa radioed for backup, differed markedly from later testimony at the motion to suppress and trial. The discrepancies, particularly in light of Penalosa's multiple stops of vehicles, required Nemser to further investigate and question Penalosa. A competent attorney would have pointed out the inconsistencies.

The arrest report is brief and somewhat confusing. It is not entirely clear when Penalosa became aware the driver fit the suspect's descriptions. The report also appears to say Penalosa requested backup when he initially started following DuFon. In his motion testimony, Penalosa testified he could not see the driver, except to tell he was a white male, until after he followed the truck and pulled alongside, at which time he saw the driver met the rapist's description. In the motion testimony, Penalosa on direct examination testified he requested backup after pulling alongside but later on cross-examination he agreed with Nemser's statement he called for backup before he followed DuFon. At trial, Penalosa testified he called the dispatcher right after leaving the restaurant to advise he was searching for the vehicle but did not request backup until after viewing the driver when he pulled alongside the truck.

Except for some confusion as to when he requested backup, Penalosa's accounts are not inconsistent. Whether Penalosa had probable cause to stop DuFon before he called for backup is irrelevant. It is clear from his report and testimony that before making the stop Penalosa had observed both DuFon and the pickup and found both the suspect and the vehicle to match the victims' descriptions. Having had probable cause to stop DuFon, it is irrelevant whether Penalosa had stopped other pickups, even if those stops were made without probable cause. Nemser's handling of the suppression motion did not constitute ineffective assistance of counsel.[4]

Motion to Exclude Statements and/or Admissions

After DuFon was arrested, he was turned over to the San Diego sex crimes division, where he was interrogated by Officers Gary Murphy (Murphy) and Ronald Jordan (,Jordan). Both officers contend Jordan read DuFon his rights, after which DuFon admitted he had voluntary sexual

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4 DuFon contends Nemser's various motions and points and authorities constituted ineffective assistance of counsel because of brevity. We find this contention to be without merit.

relations with Vickie B., Kathy P., Stephanie W., and Margo M. There are no tapes or notes of these admissions. DuFon then talked to La Mesa Police Officer David Bascom (Bascom) on the Debbie B. case and a rape of Lori M. , a rape that occurred in La Mesa on the same day as the Vickie B. rape under strikingly similar circumstances. According to Bascom's report of the interview, DuFon admitted having voluntary sex with a girl fitting Lori M.'s description on the date in question but denied any knowledge of the Debbie B. assault.

DuFon contended he had not been read his rights, had not waived his right to an attorney and had in fact requested one, and additionally had never made the alleged admissions. Nemser moved to exclude DuFon's statements and the court held hearings at which Jordan, Murphy, Bascom and DuFon testified. The police officers all testified DuFon was read his rights and gave the incriminating statements voluntarily. Despite DuFon's testimony to the contrary, the court believed the three officers and denied the motion.

DuFon now contends Nemser did not adequately research or argue the law,[5] and failed to investigate the

background of Jordan which might have turned up information to impeach the officer. DuFon presents copies of newspaper articles and pleadings in three cases which were dismissed or confessions suppressed purportedly because the court found Jordan had not Mirandized the suspect or had used unacceptable interrogation practices.[6]

DuFon's allegations Nemser failed to investigate the facts surrounding the interrogation are simply speculation, to which Nemser is now unable to respond. However, even assuming a reasonably competent attorney would have investigated the background of the three officers involved, and further even assuming Nemser did not do so, DuFon does not demonstrate Nemser would have found any information to impeach Jordan had he conducted such an investigation. All three cases DuFon submits occurred after DuFon was convicted. We presume present counsel conducted a thorough search for cases predating DuFon's

5 DuFon'S argument that under Miranda v. Arizona (1966) 384 U.S. 436. the word of the interrogating officers without more would not establish the existence of 3 voluntary confession i.s without merit. (See, e.g., People v. Kane (1984) 150 Cal.App.3d 523, 530.)

6 We note the information submitted on one of the cases does not even demonstrate Jordan was the officer involved except for a handwritten notation presumably by DuFon's attorney or investigator.

Conviction and could find no documentation of additional purported Miranda violations.

DuFon also contends Nemser provided ineffective assistance of counsel because he failed to investigate the circumstances of DuFon's alleged admission to Bascom on the Lori M. rape. DuFon submits a hearsay declaration by an investigator stating he interviewed Lori M. more than eight years after her rape. He showed her several photographs of possible suspects including 1979 photographs of DuFon. Lori M. did not identify any of the photographs as her attacker. The investigator further states Lori M. claims that at one time she was shown a photographic lineup by the police and she identified one of the individuals in a photograph as her assailant. She does not recall being asked to attend a lineup the following day. DuFon claims proper investigation by Nemser could have resulted in the suppression of DuFon's statements to the police, presumably because the information he discovered would have impeached Bascom and shown he had lied about DuFon's statements to him.

Setting aside our evidentiary concerns about the investigator's declaration, it is speculation Nemser did not

investigate the Lori M. case. Additionally, even assuming Nemser did not investigate, the fact Lori M. did not identify a photograph of DuFon more than eight years after the rape does not demonstrate Bascom lied about DuFon's interview, particularly since Bascom stated DuFon denied any knowledge of the Debbie B. case.

Motion for Suppression of Pretrial Lineup

Nemser moved to exclude in-court identification on the basis of error in pretrial lineup. DuFon argues he was ineffective in his efforts.

1) Nonrepresentation by Counsel at Lineup

DuFon contends he requested and was denied an attorney at lineup and further contends Nemser had advised the police that he represented DuFon and requested he be informed when a lineup was to take place. DuFon argues Nemser was ineffective counsel because he failed to investigate and obtain evidence to support this crucial defense.

Although DuFon testified he requested an attorney for the lineup, the two police officers he supposedly asked (Murphy and Jordan) either testified he did not talk to DuFon the day of the lineup or denied DuFon requested an

attorney. As to whether Nemser requested to be informed of the lineup, the record only shows Nemser asked Jordan whether Jordan was aware Nemser had called the county jail about DuFon between noon and 1 p.m. on the day of the lineup.

Nemser raised this defense in the motion to suppress. He examined DuFon and cross-examined the two officers. The court believed the officers' testimony DuFon had not requested an attorney. Under the law in effect at the time and the facts as found by the court, DuFon was not entitled to counsel at the preindictment lineup (see People v. Bustamante (1981) 30 Cal.3d 88, 94-96, 102), and the trial court's denial of the motion to suppress was upheld on appeal. Nemser's representation did not fall below the standard of a reasonably competent attorney.

2) Lineup Procedures Violated Due Process

DuFon contends the lineup procedures followed here violated his right to due process and denied him a fair trial. Vickie B., Jeri 0., Debbie B. , Kathy P., Margo M., Stephanie W., and Kathy E. all participated in the same lineup at the same time. During the suppression hearing, DuFon and

Kathy E., the attempted rape victim who did not identify DuFon, testified to numerous irregularities in the lineup, including the victims talking to one another about who the assailant was and the police directing the victims' attention to DuFon. If true, the alleged irregularities would have rendered the identification procedure so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification and would have required the suppression of the victims' identification. (See Stovall v. Denno (1967) 388 U.S. 293, 301-302.) However, the six victims and the police who were present at the lineup all contend the irregularities did not take place.

DuFon contends Nemser provided ineffective assistance of the irregularities. The record does not support this position. Nemser moved the prosecution to provide him with Evans's address and phone number, which motion the court denied. Nemser then located Evans on his own, and Evans as well as DuFon testified to the many irregularities both at the motion hearing and at the trial. Nemser extensively examined the victims and the police officers on the alleged irregularities. The court, however, did not find Evans credible and believed the

victims' and police officers' accounts of the lineup. Nemser's representation of DuFon did not constitute ineffective assistance of counsel.

DuFon also contends Nemser provided ineffective assistance of counsel because he did not conduct discovery on Jordan's declaration which described the lineup procedure and denied irregularities. The declaration is dated April 15, 1980, before Nemser moved to exclude identification and before Evans's testimony. The declaration, which was prepared by the prosecution for filing in the municipal court, was signed by Jordan 10 days before the preliminary hearing. It is unclear why the declaration was originally prepared but it is likely Nemser raised the alleged irregularities early in the proceedings. Nemser was aware of the declaration and examined Jordan on its content at the suppression motion. With Nemser's death, it is impossible to determine whether he knew why the declaration ,was prepared and made an informed decision no discovery was necessary.

3) Witnesses Were Improperly Influenced

DuFon contends the lineup identifications could have been suppressed had Nemser uncovered all the facts

surrounding the procedure and conveyed them to the court. According to DuFon, had Nemser carefully examined the witness lineup slips he would have noted inconsistencies between them and could have impeached the witnesses' lineup identification. Problem areas alleged in the petition include the following:

a) Three of the victims testified the police had told them they thought they had the assailant in custody before the lineup, thereby predisposing the witnesses to identify DuFon. DuFon contends the fact the victims were allegedly told their assailant was in custody was particularly important because, according to DuFon, the witnesses were told to observe number six, DuFon's number. Nemser examined the three witnesses and determined the police had not given them any other specific information. Additionally, Nemser presented DuFon's testimony that someone told the witnesses to observe number six.

b) The lineup slips indicate some of the victims had DuFon say or do various things before they made their identification. Nemser did not question the victims on any hesitancy the lineup slips may have indicated the victims experienced in identifying DuFon.

c) Stephanie W.'s lineup sheet indicates her identification was at least in part based upon DuFon's wedding ring. However, DuFon contends he was wearing a bandaid on his ring finger and he is confirmed by Vickie B.'s question on her lineup slip whether DuFon had a ring on under the bandaid on his left hand. Nemser did not question Stephanie W. on this apparent inconsistency.

DuFon contends Nemser failed to investigate these critical areas and had he done so it could have resulted in suppression of the victim identifications.[7] With Nemser's death it would now be impossible to determine whether he did investigate the issues now raised. In any event, based on review of the entire motion proceeding, including Nemser's examination of the victims, Kathy E., DuFon and the police officers, we conclude Nemser's failure to pursue the issues raised by the lineup slips did not fall below an objective standard of reasonableness.

Motion to Sever

DuFon contends Nemser's failure to move to sever

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7 For a discussion of DuFon's argument regarding Nemser's failure to introduce expert testimony on the unreliability of eyewitness testimony, see section X, infra.

the cases at trial and his stipulation to consolidate the Janice C. case with the others constituted incompetence of counsel. Nemser made a pretrial motion to sever which the court denied because the offenses were all of the same class. DuFon's implication the trial judge would have acted differently upon a later motion to sever is pure speculation.[8] Nemser's statements at the Janice C. preliminary hearing demonstrate his stipulation was an informed tactical decision to take advantage of the alibi witnesses in the Janice C. case to cast a doubt on the other cases and did not constitute incompetence of counsel. (See People v. Jackson (1980) 28 Cal.3d 264, 290.)

V

Alleged Failures to Investigate

DuFon contends Nemser failed to carefully conduct legal and factual investigations and inquiries which resulted in DuFon being deprived of potentially meritorious defenses. It is DuFon's position Nemser's failures were caused by his physical inabilities which, in accordance with the

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8 The trial judge's comment regarding the complexity of the jury instructions does not necessarily indicate the judge would have favorably considered a motion to sever, as implied by DuFon.

psychological report on the extent of his disability, prevented him from being able to assimilate facts at hand and logically proceed with them.

Defense counsel has a duty to conduct careful factual and legal investigations in order to make informed decisions on his client's behalf, and if counsel's failure to meet this duty results in the withdrawal of a crucial defense, the defendant has not had the assistance to which he is entitled. (See In re Saunders, supra, 2 Cal.3d 1033, 1041-1042.)

DuFon raises a multitude of incidents he claims demonstrate Nemser's failure to investigate which resulted in deprivation of crucial defenses. The majority of DuFon's points are either not supported by the record or are without merit and we summarily reject them.[9]

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9 We consider questions raised regarding the following to either be without merit or not supported by the record: 1) Nemser's stipulation to examining physicians not being required to testify; 2) alleged inconsistencies in Janice C.'s description to her assailant's route; 3) questions regarding the position of Janice C.'s pants during oral copulation; 4) failure to obtain service station records in connection with Janice C. case; 5) allegations the rape report in Janice C. Case indicates no rape occurred; 6) alleged failure to discover or conduct exculpatory test on DuFon,s car in Janice C. case; 7) alleged failure to conduct investigation as to whether witnesses were engaged in prostitution or had

As to many of the remaining contentions, the best evidence whether Nemser failed to investigate or whether he investigated and made an informed tactical decision not to pursue an issue would be Nemser's own testimony. In addressing these issues we keep in mind the prejudice DuFon's delay and Nemser's death have caused the People.

Nemser's Alleged Failure to Obtain Medical Examination Reports

Based upon Nemser not requesting copies of the reports of examining physicians in a discovery motion, DuFon contends Nemser did not obtain the medical reports as ' a reasonably competent defense counsel would have done. Even if we are to assume that Nemser did not obtain

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prior convictions; 8) alleged failure to investigate DuFon's whereabouts on the date of Vickie B. rape; 9) questions on DuFon's beard on the day of Stephanie W. rape; 10) alleged discrepancies in the Garcias' testimony; 11) Debbie B.'s testimony regarding a Mustang owned by assailant's father; 12) alleged inconsistencies between Stephanie W.'s lineup slip and police report; 13) alleged discrepancies in Stephanie W. police report; 14) alleged discrepancies in address and telephone number of Vickie B.'s mother.

Questions raised about Nemser's failure: 1) to investigate inconsistencies between Officer Penalosa's police report and later testimony, and 2) to investigate inconsistencies in lineup slips, are addressed in section IV, ante.

copies of the reports and we were to also find that a reasonably competent defense counsel would have done so, DuFon does not demonstrate that Nemser's failure to

Nemser's Alleged Failure to Obtain Test Results

Some of the victims' police reports state the camper shell where the sexual assaults took place had a mattress. According to DuFon, the police took a piece of foam rubber from his home following his arrest. He contends it is likely the police performed tests on the mattress for body fluids and other physical evidence that could have been exculpatory to him. Once again, based on Nemser's discovery motion, DuFon contends Nemser failed to obtain these hypothetical test results or to conduct tests of his own, thereby failing to meet his duty to investigate potentially exculpatory evidence. (See People v. Bess (1984) 153 Cal.App.3d 1053, 1062.) Once again, even if we assumed that the police had tested the mattress and that Nemser failed to obtain test results or to investigate independently, and we further held a reasonably competent defense counsel would have done so, DuFon does not demonstrate that Nemser's failure resulted in the withdrawal

of any defense.

Nemser's Alleged Failure to Investigate Janice C. Case

DuFon raises several issues with respect to Nemser's alleged failure to investigate the Janice C. case. All but one of these we have summarily rejected as being without merit or not supported by the record. One, however, warrants consideration.

After Janice C. was raped, her assailant returned her to her place of employment. Walter LaPointe, her employer, testified at trial Janice C. reported to him she had been raped and that she gave him a license number of the assailant's automobile which he wrote down. LaPointe testified he called an Imperial Beach police officer he knew, Sergeant Handley, to report the rape. After talking with Janice C., Handley called in Sergeant Paseman of the Coronado Police Department. Both Handley and Paseman testified LaPointe and Janice C. provided them with the license number. Paseman ran a motor vehicle check on the number and determined DuFon was the registered owner. At trial LaPointe produced the piece of paper on which he had reportedly written the number. It is inferentially DuFon's position that DuFon did not rape

Janice C. and that the license number evidence was a fabrication.

DuFon contends Nemser failed to investigate LaPointe and Janice C. and concludes that if he had, he would have discovered facts bearing on their credibility. The only "facts" set forth, however, are: 1) LaPointe owned two businesses in the same shopping center: the clothing store where Janice C. was employed and a topless bar; 2) Lapointe lied when he testified at DuFon's arraignment that he was Janice C.'s uncle; and 3) LaPointe's testimony on where the piece of paper with the license number was located prior to trial was inconsistent.

Nemser cross-examined LaPointe both on his lie at the arraignment and on the location of the piece of paper. He also cross-examined Janice C. about having told a defense investigator the police had provided her with the license number and called the investigator, who testified Janice C. had told him it was the police who brought a license number to her and asked her if it appeared to be the license number of the assailant's vehicle. The record also demonstrates Nemser had an investigator from the prosecutor's office question Sergeant Handley regarding

the license number and Nemser examined the investigator at trial. The record demonstrates considerable investigation by Nemser as well as vigorous examination and cross-examination. We find no incompetence of counsel.

Nemser's Alleged Failure to Properly Interview DuFon and Other Defense Witnesses

DuFon contends Nemser spent a total of one and one-half hours with him before trial and failed to consult with him during trial. According to DuFon, Nemser's failure to consult with him constituted ineffective assistance of counsel.

Accepting DuFon's allegations at face value, spending one and one-half hours with a client preparing for trial of a case of this seriousness and complexity would not normally meet reasonable standards of attorney competence. However, we cannot say as a matter of law that this minimal client consultation constituted ineffective assistance of counsel since Nemser may have adequately prepared for the case through collecting information from other sources. More importantly, however, DuFon fails to specify any way in which further consultation with him would have better prepared Nemser to present his defense

except for a generalized statement the time Nemser spent with him before trial was totally inadequate to elicit sufficient facts and details of the case for adequate investigation and preparation. DuFon does not demonstrate how Nemser's failure to consult with him resulted in the withdrawal of a crucial defense. (See People v. Pope, supra, 23 Cal.3d 412, 425; In re Saunders, supra, 2 Cal.3d 1033, 1042.)

DuFon also contends Nemser failed to interview and prepare defense witnesses and submits declarations from the witnesses to that effect. DuFon specifically directs our attention to four instances of Nemser's failure to prepare witnesses: Brian Gompper, Gregory Sadeau, Marjorie Cook, and Gloria Guitron. As to Brian Gompper and Gregory Sadeau, the petition does not set forth any way in which DuFon was prejudiced by any failure there may have been to prepare the witnesses. As to Gloria Guitron, while the petition alleges preparation of the witness would have prevented confusion in her testimony, it contains no documentation that Nemser failed to prepare the witness.

Marjorie Cook, one of six neighbors of DuFon's parents who testified they saw DuFon at his parents' house at the time of the Janice C. rape, declares her only contact

with Ne... ...e trial was a brief chance meeting at DuFon's parents' home. Nemser did not advise her when she would be called as a witness until immediately before she was to testify. ...s a result, she declares she was nervous and ill prepared to act as a witness. Cook became confused in her testimony as to what day she saw DuFon, which confusion DuFon contends was a result of Nemser's failure to meet with her to discuss her testimony. Although Cook's definitive testimony that she saw DuFon on the day of the rape would have strengthened DuFon's alibi, we do not see her confusion as depriving him of a crucial defense in light of the fact five other neighbors, including her husband and son, testified without confusion as to the correct date.

Nemser's Alleged Failure to Investigate Whether the Assailant Was Left-Handed

DuFon directs our attention to places in the record (e.g., police reports, preliminary hearing transcripts) which he contends raised an inference the assailant was left-handed, including the assailant being described as wearing a wrist-watch on his right hand, holding a weapon in his left hand, and, in the Margo M. case, pulling his

jacket sleeve over his left hand before grabbing the doorknob. DuFon contends that while Nemser established at trial DuFon was right-handed, he did not explore the issue with the victims and therefore conducted ineffective cross-examination. DuFon further speculates Nemser did not investigate further whether there were other indications the assailant was left-handed.

While DuFon did examine victims on whether the assailant was wearing a wristwatch on his right hand, he does not appear to have examined them on other points that may have indicated the assailant was left-handed. With Nemser's death, the best evidence as to the extent of his investigation is no longer available. Also with his death, it would be essentially impossible to determine if his failure to pursue this area resulted from a failure to appreciate its significance or constituted an informed tactical choice based on information in his possession.

Nemser's Alleged Failure to Obtain and Introduce Fingerprint Evidence

The police tested for fingerprints DuFon's truck, car and a matchbook the assailant allegedly gave Janice C. No victim's fingerprints were found in Dufon's vehicles and

DuFon's fingerprints were not found on the matchbook. Based on the fact Nemser did not request the test results in his discovery motion, DuFon contends Nemser did not demand production of the test results. DuFon contends effective counsel would have subpoenaed the test results. It is evident from the record Nemser had access to the test results. At trial he introduced evidence no victim's prints were found in the truck through Detective Jordan's testimony and introduced evidence of a conversation he had with the prosecution's investigator to the effect no victim's prints had been found in DuFon's car nor DuFon's prints on the matchbook. Nemser introduced the potentially exculpatory evidence and we perceive no ineffectiveness of counsel.

VI

Failure to Oppose Victim Testimony After Hypnosis

During the investigation, the police hypnotized Vickie B., Jeri O., and Kathy P. in an attempt to obtain information on the assailant. DuFon argues that while at the time of DuFon's trial, testimony of previously hypnotized witnesses was not per se inadmissible, the law was in a state of flux and the unreliability of such testimony was well established.

DuFon contends Nemser should have opposed the introduction of testimony by these three witnesses based on their testimony being tainted. Instead, Nemser encouraged the introduction of the witnesses' statements under hypnosis.

In 1982, the California Supreme Court held the testimony of witnesses who had "undergone hypnosis for the purpose of restoring their memory of the events in issue cannot be received in evidence unless it satisfies the Frye standard of admissibility [Frye v. United States (D.C. Cir. 1923) 293 F. 10131." (People v. Shirley (1982) 31 Cal.3d 18, 54.) Nemser's failure to anticipate a subsequent Supreme Court decision does not constitute incompetence of counsel, "prescience being no more required of competent counsel than omniscience." (People v. Criscione (1981) 125 Cal.App.3d 275, 295.) A review of the trial testimony demonstrates Nemser attempted to use prior inconsistent statements from the hypnotic interviews to impeach the witnesses' trial testimony. His actions did not constitute incompetence of counsel but rather constituted an informed tactical decision.

VII

Mishandling of Data on Semen Analysis

Defense expert Dr. Edward Blake testified that based on semen and blood typing of the victims and DuFon: 9 out of 10 men could have donated the semen sample taken from Vickie B.; DuFon was eliminated as a possible donor of the semen sample taken from Margo M.; although not absolute, under the best interpretation DuFon was eliminated as a possible donor of the semen sample taken from Stephanie W.; and 6 out of 10 men could have donated the semen taken from Kathy P. DuFon contends the prosecution intentionally and improperly manipulated the figures on cross-examination and changed the focus to what percentage of the population would match DuFon's blood type and secretor status. According to DuFon, Nemser did not object to the irrelevant line of questioning because of his inability to comprehend the distortion of the evidence. DuFon argues the failure to correct the misinformation brought out by the prosecutor was enormous, in that it was repeated by the Attorney General on appeal and used by this court in denying the appeal.

There were two witnesses who testified on semen and blood type analysis. Prosecution witness Sharon

Lynch performed the analysis in the San Diego Police Department lab and testified DuFon was not eliminated as a possible donor in any of the cases. In her testimony she affirmatively answered questions: 1) that approximately 3.5 percent of the population could have donated the sperm in the rapes, and 2) that 96 percent of the population was excluded. It is this testimony that was used on appeal, not the testimony of Dr. Blake as stated in the petition. We conclude from reading all of Lynch's testimony that the witness did not understand the questions and meant DuFoN belonged to a blood/secretor group that constituted 7 percent of the population. The prosecution also questioned Dr. Blake on the percentage of the population that belonged to DuFon's blood type/secretor group to which Dr. Blake responded 7 percent.

We agree with DuFon the size of his blood type/secretor group is irrelevant and that Lynch's testimony gives the mistaken impression DuFon is part of only 3.5 percent of the population that could have committed the rapes. Nemser did not correct this misinformation either through cross-examination or objection. Despite the potential impact of this testimony, Nemser did not

cross-examine the witness on this point except to try to establish how many men in the United States could have donated the semen. We agree Nemser's handling of this data was ineffective.

VIII

Alleged Tactical Errors

Normally, tactical decisions of defense counsel will not provide a basis for finding ineffective assistance of counsel. However, this is not the case if counsel by his own inaction has deprived himself of the reasonable basis upon which to make an informed tactical and strategic choice. (See, e.g., People v. Frierson (1979) 25 Cal.3d 142, 162-164.) "[Even tactical decisions may demonstrate incompetence if made without the benefit of 'substantial factual inquiry.'" (Id. at p. 163.)

DuFon contends Nemser made numerous tactical decisions that constituted ineffective assistance of counsel and deprived DuFon of the defense to which he was constitutionally entitled.

Arranging an In-Court Lineup

We find no merit to the argument Nemser,s arrangement of a lineup at the preliminary hearing

constituted ineffective assistance of counsel. DuFon raised serious questions regarding the conduct of the police lineup including allegations the police had prompted the victims to identify him. Nemser had reason to believe, given a nonsuggestive lineup, the victims may not have been able to identify DuFon. We conclude Nemser's conduct of the in-court lineup was an informed tactical choice.

Nemser's Alleged Failure to Separate the Identifications and Details of Testimony of Various Witnesses

DuFon contends Nemser failed to isolate and address the facts of each case separately, calling witnesses in random order and running details of descriptions of different witnesses together. As with any trial involving charges of multiple crimes involving multiple victims and multiple witnesses, Nemser was faced with the difficult task of keeping the facts of each case separate. On review of the record, we do not perceive incompetence of counsel in Nemser's presentation of DuFon's defense.

Nemser's Alleged Errors as to Evidentiary Issues

Dufon contends Nemser dwelled on irrelevant detail, such as admitted typographical errors in an affidavit and a police report, while failing to object to the introduction of

two knives. The two knives were found in DuFon's possession at the time of his arrest: a penknife in his pocket and a straight-edged knife with a handle wrapped in silver duct tape. DuFon argues Nemser should have objected to the knives being introduced into evidence because they did not match any witnesses' descriptions of knives used in the attacks. Stephanie W. testified her assailant threatened her with what looked like a hunting knife with a five-inch blade and a tan handle. She further testified the knife with the tape on the handle resembled the knife with which she was threatened. While there may not have been grounds for the .introduction of the penknife, we doubt DuFon's possession of such a commonplace item with no connection to the crimes adversely affected his defense.

Nemser's Failure to Introduce Expert Testimony on Unreliability of Eyewitness Testimony

While eyewitness identification was clearly a crucial issue in the case, we conclude Nemser's failure to offer expert testimony on this issue does not establish incompetence of counsel. In 1984, the California Supreme Court first addressed the admissibility of expert testimony

on eyewitness identification, holding that where eyewitness identification is a key element of the prosecutor's case which is not substantially corroborated by evidence giving it independent reliability, it is normally error to exclude qualified expert testimony offered by the defendant. (People v. McDonald (1984) 37 Cal.3d 351, 365, 377.) McDonald acknowledged that historically trial courts had been reluctant to admit such evidence and appellate decisions had been almost unanimous in upholding the trial court's rulings. (Id. at p. 365.) Nemser's failure to anticipate a subsequent Supreme Court decision does not constitute incompetence of counsel. (See People v. Criscione, supra, 125 Cal.App.3d 275, 295.)

IX

Jury Selection and Alleged Jury Misconduct

Voir Dire Deficiencies

DuFon contends Nemser failed to conduct voir dire in a manner consistent with effective assistance of counsel, which resulted in DuFon being tried by a biased and prejudiced jury. DuFon bases his allegations of prejudice on an investigator's hearsay declaration that the jury foreman made statements showing prejudice toward DuFon

and a letter one juror wrote to the judge stating she was angry DuFon wanted and got a jury trial.

Nemser did not have the voir dire transcribed for appeal. Without a transcript it is impossible to determine the extent of voir dire or whether it was competently conducted. We note, however, the petition only states Nemser asked Dufon to indicate which potential jurors he instinctively did not like and that Nemser's voir dire was very limited. From this, the petition infers minimally competent questioning would have determined the two jurors were prejudiced against DuFon before trial. DuFon has not met his burden of establishing incompetence of counsel by his general allegations that Nemser's voir dire was deficient.

Juror Misconduct

DuFon alleges several incidents of juror misconduct, including the jury foreman drinking during trial, a juror's husband influencing the juror, and juror contact with a complaining witness and her mother. DuFon submits several declarations by people who attended the trial, setting forth their observations of the conduct and stating they told Nemser what they observed.

According to the declarations, a juror (purportedly the jury foreman) was observed drinking, liquor was smelled on his breath and he was observed sleeping during trial. The juror also allegedly made derogatory comments in the court men's room about defense witnesses and "drag racing type people" in the presence of one of the defense witnesses. Additionally, jury members were observed talking with Debbie B. and some jury members were observed eating lunch with Debbie B.'s mother.

Also, during the trial, the court removed one juror upon Nemser's motion because the court found her husband had mingled with witnesses and reportedly discussed matters with Debbie B.'s mother, to whom he reportedly said, "That's what I keep telling my wife." According to the declarations and the trial transcript, the husband sent hand signals to his.wife commenting on evidence during trial, made comments in court which required the court to admonish him to be quiet and conversed with Debbie B. and her mother.

Although Nemser successfully moved to have the one juror removed, DuFon contends he provided ineffective assistance of counsel by not moving for a mistrial on the

bases of the several instances of alleged jury misconduct. "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (People v. Galloway (1927) 202 Cal. 81, 92, quoting Lombardi v. California St. Ry. Co. (1899) 124 Cal. 311, 317.) It is the jurors' duty not to converse among themselves or with anyone else on any subject connected with the trial. (Pen. Code, section 1122.) If Nemser could have established ,the jurors were conversing about the case, it is possible he might have successfully moved for a mistrial or to remove additional jurors. However, with the exception of the one juror's comments in the men's room and the husband's statement he kept telling his wife something, the declarants did not know the content of any conversations. Also, with Nemser's death, it would now be impossible to determine if he had information that militated against moving for a mistrial or the removal of additional jurors and therefore made an informed tactical decision not to do so.

X

While the constitutional right to assistance of counsel includes the guarantee that such assistance be effective,

due process does not require counsel to render errorless representation, but rather to render reasonably effective assistance. (See In re Saunders, supra, 2 Cal.3d 1033, 1041; People v. Corona (1978) 80 Cal.App.3d 684, 705.) It is probable Nemser's representation of DuFon was affected by his brain surgeries and the medication he took to ward off brain seizures. Additionally, DuFon makes a prima facie showing of certain deficiencies in Nemser's representation, including his failure to correct the mistaken impression DuFon belonged to only 3.5 percent of the population who could have committed the rapes based on blood type/secretor status, failure to adequately prepare some witnesses or to adequately consult with DuFon, and in some instances extensively examining witnesses on apparently minor points such as admitted typographical errors. However, upon reviewing the record, it is evident how this court came to the conclusion on appeal that Nemser was able counsel who conducted a "very vigorous and able defense." While recognizing the apparent deficiencies in Nemser's performance, considering his overall performance we do not find that DuFon has made a prima facie showing Nemser failed to act in a manner

expected of a reasonably competent attorney acting as a reasonably diligent advocate. (People v. Pope, supra, 23 Cal.3d 412, 425.)

In any event, even if we were to find DuFon had made a prima facie showing Nemser's representation fell below the standard expected of reasonably competent counsel, we find DuFon could not have been prejudiced by any deficiencies in Nemser's representation. The six women raped identified DuFon. DuFon admitted to police he engaged in voluntary sexual relations with some of the victims. One victim, Janice C., provided the police with DuFon's license number. DuFon would have us believe the victims were mistaken and their identifications tainted, the police from both San Diego and La Mesa fabricated his "admissions," and Janice C., her boss, and police from both Imperial Beach and Coronado fabricated the story of his license number. To accept DuFon's position, we must believe all these people, acting either in concert or singly, fabricated the case against DuFon for no apparent reason. We find the evidence against DuFon to be persuasive. We do not find a reasonable probability exists that a more favorable outcome for DuFon would have been reached

absent any errors or omissions Nemser may have committed. (See People v. Karis, supra, 46 Cal.3d 612, 657.)

DISPOSITION

The petition for writ of habeas corpus is denied.[10]

WIENER, Acting P.J.

WE CONCUR :

WORK, J.

BENKE, J.

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10 In light of our determination DuFon received effective assistance of counsel at trial, we find DuFon's allegations of ineffective assistance of counsel on appeal to be irrelevant and do not address them further.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 1, No. D007585

S009357

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE THOMAS DUFON

on

HABEAS CORPUS

Petition for review DENIED.

LUCAS, C.J.